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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 964

WELFARE FINANCE CORPORATION

&

NATIONAL FACTORS, INC., *Petitioners,*

v.

TANENBAUM TEXTILE CO., INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

ISIDORE H. WACHTEL
Counsel for Petitioner
1100 - 17th Street, N.W.
Washington, D. C.

HARRY M. WASSERMAN,
JEAN J. PROVOST, JR.
Of Counsel

PRES. OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of Ohio, entered on October 7, 1964 in the cause entitled Tanenbaum Textile Co., Inc.,

Plaintiff-Appellee v. Welfare Finance Corporation and National Factors, Inc., Defendants-Appellants #38902.

OPINIONS BELOW

There is no reported opinion in the Supreme Court of Ohio; its judgment and order of dismissal is reported at 177 Ohio St. 54, 201 N.E.2d 886 (Appendix E). The certificate of said court certifying the existence of federal questions is set forth in Appendix F. The opinion of the Court of Appeals, First Appellate District of Ohio is reported at 201 N.E.2d 787, (Appendix D). The Memorandum Opinion and Separate Findings of Fact and Law of the Court of Common Pleas, Hamilton County, Ohio are not reported, but are set forth in Appendices B and C respectively.

JURISDICTION

The judgment and order of the Supreme Court of Ohio was entered on October 7, 1964. By order of this Court dated 22 December 1964, time to file this petition was extended up to and including March 6, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) since state action was drawn into question on the grounds of its being repugnant to Article VI, Clause 2 of the Constitution of the United States and the Statutes of the United States, to wit, 31 U.S.C. § 203 and 41 U.S.C. § 15 and rights, privileges and immunities were claimed under Statutes of the United States, to wit, 31 U.S.C. § 203 and 41 U.S.C. § 15.

QUESTIONS PRESENTED *

1. Where Congress has enacted the Assignment of Claims Act of 1940 as amended, 31 U.S.C. § 203, 41 U.S.C. § 15, permitting prime contractors of the Department of Defense (and other departments and agencies) to assign to private and government[1] financing institutions monies due or to become due from the United States to induce such financing institutions to lend money to such contractors in order to facilitate, effectuate and implement a national program and policy for the procurement of materials of war to secure the national defense, can the courts of the State of Ohio apply a state rule of common law to assignments received by such a financing institution which places such institution in "the shoes of the prime contractor" and makes it a mere stakeholder or guarantor of the prime contractor's obligations to subcontractors

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* The Court may speculate as to the failure of the United States to "intervene" in the proceedings below in view of the petitioner's assertions regarding federal questions and impact on government procurement, of which petitioners have informed the government.

As more fully appears herein, *infra*, petitioners, and the prime contractor are involved in a "dispute" with the government over the "termination settlement" with regard to which, "appeal" proceedings were instituted pursuant to the terms of the prime contracts and Armed Services Procurement Regulations and an action instituted by the prime contractor and petitioners as assignee against the United States in the United States Court of Claims for substantial damages and a review under "Wunderlich Act," 41 U.S.C. §§ 321-322 of the determinations made by the government in the termination proceedings.

[1] "V" loans by Departments of Defense, Agriculture, Commerce and Interior, and General Services Administration and Atomic Energy Commission, 50 U.S.C. App. 2091, E.O. 10480; direct loans by Treasury Department, 50 U.S.C. § 2092, E.O. 10480, par. 310; Small Business Administration, 15 U.S.C. § 636, 13 C.F.R., Parts 120, 121 and 122; and Small Business Investment Corporations licensed by Small Business Administration, 43 Comp.Gen. 138.

to the extent of monies received under such assignment?

2. Is the enunciation and application of the common law of the State of Ohio, making an assignee-financing institution, which has received monies due from the United States pursuant to a valid assignment made under Assignment of Claims of Act of 1940, as amended, such a stakeholder or guarantor in conflict with, federal statutes regarding such assignments?

3. Does the application of such common law rule subject the procurement policies and programs of the United States to state control and introduce disparities, confusion and conflict so as to make such state action[2] repugnant to Article VI, Clause 2 of the Constitution of the United States?

4. Where a government prime contractor has borrowed money from a financing institution for the performance of a supply contract[3] with the Department of Defense pursuant to the provisions of the Armed Forces Act[4] and to the Armed Services Procurement Regulations[5] and such contractor has duly assigned to said financing institution all monies due or to become due from the United States, is the financing institution

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[2] *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); *Barrows* v. *Jackson*, 346 U.S. 249, 253 (1953); *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1947); *American Federation of Labor* v. *Swing*, 312 U.S. 321 (1940).

[3] The type of contract involved in the instant case must be distinguished from contracts for the construction, alteration or repair of public buildings or public works. The rights of parties involved in such contracts are delineated in 49 Stat. 793, 40 U.S.C. § 270(a), and cases decided by federal courts. (P. 13 *infra*)

[4] 10 U.S.C. §§ 3012, 6011 and 8012.

[5] 32 C.F.R. § 1.108, *et seq.*

obligated to pay the claims of unpaid subcontractors of the prime contractor out of monies received by the financing institution under such assignment, upon termination, when such institution has not been repaid all the sums advanced to the prime contractor in connection with said prime contract?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

ARTICLE VI—Clause 2. Supreme Law of Land

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code

Titles 31 U.S.C. § 203 and 41 U.S.C. § 15 involved herein are set forth in full in Appendix A.

STATEMENT

On May 13, 1955 and June 30, 1955 The Douglas Corporation (hereinafter called Prime Contractor, Contractor or Prime) entered into four written fixed-price prime supply contracts with the Department of the Army for the manufacture and delivery to the government of a substantial quantity of nylon-coated ponchos.

On June 7, 1955 and July 5, 1955, The Douglas Corporation executed and delivered to petitioner, National Factors, Inc., four written assignments, one for each of the prime contracts, under which, for value

received, the contractor sold, assigned, transferred and set over to said petitioner "all monies due or to become due" under each of said four contracts. On August 9, 1955 said petitioner duly filed with the government (which duly acknowledged receipt thereof) "Notice of Assignments" to which were attached true copies of each assignment.

Thereafter, the contractor negotiated with and ultimately placed orders with respondent which orders were accepted effective on or about October 3, 1955 by respondent with full knowledge of the execution of said four assignments. Respondent agreed to furnish to the prime contractor (at the plant of another subcontractor of the prime) the nylon-coated poncho cloth required by the prime for the fabrication of the ponchos described in the four prime contracts.

During the course of the efforts of the prime contractor and its various subcontractors to perform, petitioners, at the written request of, and for the account of the prime contractor, advanced various sums of money to its principal subcontractor, U S. Display Corporation, and others. On March 25, 1957, the government, upon notice to the prime and petitioners, and prior to completion, suspended all further work on the aforesaid four contracts by the issuance of an order of "Termination for Convenience of the Government".[6] To the date of said termination order,

[6] The phrase "Termination for Convenience of the Government" is not used to indicate a default, breach or cancellation of the contract, nor the completion thereof or a termination of all of the rights and obligations of the parties thereunder. See *Houdaille Industries, Inc.* v. *United States*, 138 Ct.Cl. 301, 151 F.Supp. 298 (1957); *Klein* v. *United States*, 152 Ct.Cl. 8, 285 F.2d 778 (1961); *John Reiner & Co., etc.* v. *United States*, —— Ct.Cl. ——, 325 F.2d 438 (1963); *Brown & Son Electric Company* v. *United States*, —— Ct.Cl. ——, 325 F.2d 446 (1963); *Goldwasser* v. *United States*, —— Ct.Cl. ——, 325 F.2d 722 (1963).

petitioners had advanced for the account of the prime contractor approximately $281,585.70. Between the date of said termination and during the pendency of "termination procedures", which were "concluded" on or about July 17, 1960, additional funds were advanced by petitioners for the account of the prime, so that on said date there was due to petitioners the sum of $658,453.66 plus interest.

On July 18, 1960, petitioners, as assignees, received from the government the sum of $259,307.35 representing monies due and owing to the prime contractor. Accordingly, as of July 18, 1960, the prime contractor was indebted to petitioners for unpaid balance of $399,146.31 plus interest. Subsequent to July 18, 1960, petitioners, at the request of the prime contractor, made additional payments and other advances in connection with said four contracts in the amount of $848,960.23 for total advances of $1,507,413.89 from shortly prior to the inception of the four prime contracts to May 31, 1963. During this entire period petitioners as assignees, had received from the government the sum of approximately $712,878.66 and other credits and funds not germane to this dispute. On May 31, 1963 there was still due and owing to petitioners from the prime, $747,841.21 plus accrued interest.

The prime contractor, dissatisfied and aggrieved by the determination made by the government in termination procedures, on August 20, 1962 noted an appeal to the Armed Services Board of Contract Appeals (In re: *Appeal of The Douglas Corporation*, ASBCA No. 8566)[7] under the "disputes" procedure provided in the prime contracts and Armed Services Procurement

[7] This Appeal was "dismissed without prejudice" on August 10, 1964 at the request of the government pending further investigations and is subject to reinstatement upon completion thereof.

Regulations. In addition, the prime contractor and petitioner, National Factors, Inc., as assignee, on March 22, 1963 instituted an action against the United States in the United States Court of Claims for breach of contract and review of the administrative determination regarding termination, under the "disputes" article of the contract and requested damages in the amount of $2,300,000.00 (*National Factors, Inc., Assignee and The Douglas Corporation* v. *United States*, Ct.Cl. No. 93-63).

On February 10, 1961, prior to commencement of the above proceedings, the respondent filed suit against the petitioners in the Ohio Court of Common Pleas, asserting three causes of action. Only the second cause of action was litigated to conclusion, and the judgment thereon is the subject of the instant petition.

The second cause of action asserted that the prime contractor was indebted to the respondent for the sum of $244,953.28; that payments and credits on account had been made to it in the sum of $162,428.50[8] and that there remained due and owing to the respondent $82,524.72 (of which amount respondents owed its subcontractors $36,713.97). Respondent conceded it had knowledge that the contractor had executed the assignments prior to incurring any obligation to respondent; that subsequent to aforesaid termination, petitioners had received as assignees of the prime contractor the sums of $284,484.29 from the government, but asserted that such payment by the government was "conditioned" on the payment of such monies to subcontrac-

[8] While the respondent did not so state, there is no dispute that sums were paid to it by the petitioners for the account of the prime contractor prior to the time the government made its "last" payment on July 18, 1960.

tors, including the respondents, and that no portion of said sum had been paid to respondent.

Petitioners asserted that the contractor had claims pending against the government and was engaged in a dispute and litigation with the government; that the contractor was indebted to the petitioners for sums in excess of the amounts received from the government, and that by virtue of the assignments made pursuant to the Assignment of Claims Act (Appendix A) and the law in such cases, the petitioners had an absolute right to apply monies received against the unpaid balance of the contractor's debt to petitioners.

Following a trial without a jury, the Court of Common Pleas issued its Memorandum Opinion, dated October 14, 1963 (Appendix B) and on November 29, 1963 entered judgment in favor of respondents in the amount of $82,524.72, together with interest from July 28, 1960 in the sum of $16,536.62. Motions for new trial were duly made and denied. An appeal was duly taken to the Court of Appeals, First Appellate District of Ohio. The matter was heard on the transcript of the docket and journal entries of the Court below, a bill of exceptions, briefs of the parties and oral argument, and on April 27, 1964 said Court handed down its opinion and decision affirming the judgment of the trial court (Appendix D).

Petitioners thereupon duly noted their appeal to the Supreme Court of Ohio and in their assignment of errors again asserted their rights under the Assignment of Claims Act. Respondents moved to dismiss the appeal and, on October 7, 1964, the Supreme Court of Ohio dismissed the appeal without opinion (Appendix E).

As appears from the Certificate of the Supreme Court of Ohio, dated March 1, 1965, the petitioners raised federal questions. The details of petitioner's pleadings, brief after trial and before judgment, brief and supplemental brief in support of its motion for a new trial in the trial court, petitioner's assignment errors, brief and reply brief in the Court of Appeals, and petitioner's Notice of Appeal and Motion to certify the record to the Supreme Court of Ohio, all clearly establish that petitioners raised the question of title, right, privilege and immunity under 31 U.S.C. § 203 and 41 U.S.C. § 15 and the constitutional conflict between the common law of Ohio and the aforesaid federal statutes.

REASONS FOR GRANTING WRIT

1. The Court of Appeals below found:

> . . that the court below based its judgment both upon the applicability of the Ohio common law rule relative to assignments generally to the effect that the rights of the assignee are controlled by those of the assignor and, further, upon the applicable Federal statute, the so-called Assignment of Claims Act and upon the specific provisions contained in the contract itself for the payment of claims upon termination. The judgment below is right on both counts. 201 N.E.2d 787, 788 (Appendix D)

It is, therefore, clear that the decisions below rest upon the application of Ohio common law to the rights of the petitioners under the Assignment of Claims Act and the contract between the United States and the prime contractor (see *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1942).

The decisions of the Courts below, therefore, fall within the ambit of cases before this Court since

M'Culloch v. *Maryland*, 4 Wheat (U.S.) 316, 427 (1819) involving state action—whether legislative or judicial—which imposes upon the performance of activity sanctioned by federal license, conditions not contemplated by Congress . . . or which give a state control over the performance of duties of contractors to perform work for the federal government, or where state law touches upon the area of . . . a federal statute . . . so that it is . . . set at naught or its benefits denied by state law. See: *Sears, Roebuck & Co.* v. *Stiffel & Co.*, 376 U.S. 225 (1964) (state common law rule on unfair competition impinging on federal patent law); *Sperry* v. *Florida*, 373 U.S. 379 (1963) (practice of patent law in a state); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963) (application of state statute fixing rates of carriage of household goods to charges fixed in a government contract); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (state regulation of federally licensed vessels); *Public Utilities Commission* v. *United States*, 355 U.S. 534 (1958) (application of state statute controlling transportation charges and application to federal procurement of such services); and *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (regulation of contractors performing work for federal government).

Where the Congress has expressed national concern over the preservation of small business firms; has implemented this policy by authorizing direct lending of public funds and pledging of the federal credit to small business;[9] has further implemented that policy by authorizing preferences and set-asides of government procurement to small business;[10] seeks to en-

[9] 15 U.S.C. §§ 636, 661.

[10] 10 U.S.C. § 2301; 15 U.S.C. §§ 637, 644; 38 Comp. Gen. 864.

courage private lenders to finance government contractors, producing material of war and other goods and supplies in the interest and furtherance of national defense by enacting legislation intended to assure such lenders of the validity of their assignments and the protection of the security created thereunder;[11] this Court should determine whether state action which derogates such assignments' validity and priority and which dilutes their effectiveness as security should be permitted to defeat or limit procurement policies settled under federal authority.

> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (*United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944))

2. The decisions of the Courts below, if allowed to stand will introduce "disparities, confusion and conflicts" that will seriously and substantially impinge on federal procurement policies and unduly burden the execution of programs enacted for the security and national defense. It is clearly established that Congress, in enacting the Assignment of Claims Act of

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[11] House Report No. 376, 82nd Cong., 1st Sess., pp. 1-3, Senate Report No. 217, 82nd Cong., 1st Sess., pp. 1-2.

1940, and in amending that act in 1951, intended to assist the national defense program, *New Amsterdam Casualty Company* v. *Manufacturers and Traders Trust Company*, 330 F.2d 575 (1964), and more specifically to *encourage independent financing* of government contracts, *Central Bank* v. *United States*, 345 U.S. 639, 646 (1953); *Mercantile National Bank* v. *United States*, 150 Ct.Cl. 700 (1960); *American Fidelity Co.* v. *National City Bank of Evansville*, 266 F.2d 910, 915 (1959) and cases therein cited.

The decisions below *discourage* the financing of government contracts by making the rights of the assignee-financing institutions extremely doubtful by subjecting such rights to fifty variant state rules (whether statutory or common law)[12] rather than one uniform rule applicable to federal supply contracts. Government financing institutions *cannot*[13] and private institutions *will not* advance monies to contractors where their collateral is subject to "after-arising" equities between the contractor-assignor and any other party that

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[12] Besides the common law rule enunciated in the Courts below, other states apply other common law rules. Some require an assignee to give notice. Others follow the "first in time, first in right" view (see the Restatement of Contracts § 173). New York follows the rule which gives the prior assignee an absolute prior right to any monies collected.

Many states have modified the common law rules by statutory enactments. Some states have "validation" statutes similar to the New York common law rule. Others adopted "bookmarking" statutes; still other states, notably California, adopted "notice filing" statutes patterned after the requirement of the Uniform Receipts Act.

[13] See Small Business Act, 15 U.S.C. § 636(a)(7) which requires that Small Business Administration loans and advances ". . . be of such sound value or so secured as reasonably to assure repayment."

may have subsequently dealt with the prime.[14] Yet, the decision below squarely places the assignee "in the shoes of the assignor", as to such "after-arising" equities, and requires *it* to pay even while *compulsory* proceedings involving the government contracts are pending before administrative and judicial tribunals.

While the decision below will affect sources of credit of all government contractors, the impact will fall most heavily on small business concerns engaged in contracting with the government. This Court needs no citation for the fact that lines of credit which are open to "big business" are not available to smaller enterprises, and that the only significant type of financing offered to such small business concerns is that which contemplates "receivable financing", i.e., pledge or assignment of monies due or to become due. Yet the United States government has affirmatively fostered small business participation in government and defense procurement.[15] The effective implementa-

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[14] Certainly lending institutions will not lend money under an assignment where payments received must be turned over to other creditors later-in-time, or where such moneys must be paid out even before resolution of the rights of the contractor or the assignee against the government can have been litigated and concluded in the only forums provided therefor by the contract and the applicable federal statutes and regulations. (*United States* v. *Bianchi infra;* see discussion under point 3 *infra.*)

[15] Government Small Business and Procurement Practices and Programs, H.Rep. No. 1937, 88th Cong., 2d Sess., Dec. 24, 1964 at p. 1, which discusses the federal policy of encouraging small business participation in federal procurement as specifically embodied in the Defense Production Act of 1940; the Armed Services Procurement Act of 1947; the Universal Military Training Services Act of 1948; the Federal Property and Administrative Services Act of 1948; the Communication Satellite Act of 1962.

tion of these affirmative federal policies should not be placed in jeopardy as they are by the decisions below.

In fiscal 1963 the United States spent 27,793 million dollars for defense procurements. Of that amount, 4,597 millions or some 16% of the total amount was spent on procurements awarded to small businesses.[16] During that same fiscal year, prime procurement contracts totalling 1,346 million dollars were awarded to concerns located in Ohio (see Statistical Abstract of United States, 1964, 85th ed. p. 259). Even if the decision below were limited to Ohio, and affected only some 16% of the Department of Defense contracts awarded to small business in that state, its effects would be felt nationally. But the impact is not limited to Ohio. The decision below makes the rights of the assignee of funds due or to become due under a federal contract subject to the provisions of the laws of each of the fifty states[17] and affects not only small business but all government contractors.

Patently, private and public lenders, confronted with this uncertainty and the need to treat differently with contractors in each of the fifty states, will either refuse to make loans to contractors in certain states, or will impose higher interest rates and other onerous conditions which ultimately result in higher costs to the government. The end result will be a narrowing of the mobilization base, reduction of competition for government procurement, and the con-

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[16] *Id*, Appendix F at p. 122.

[17] This Court recently granted certiorari in *United States* v. *Yazell*, Dk.No. 575 which presents an issue similar to that here presented. When loans are made by the Small Business Administration, are the rights of the parties to be governed by the terms of the federal statute or by the laws of the fifty different states?

centration of such procurement in certain states or in smaller numbers of companies to the serious impairment of not only the national defense capability but the economic well-being of many communities.

3. The decisions of the Ohio Courts below are in direct conflict with the Federal Court decisions in *Peterman Lumber Company* v. *Adams*, 128 F.Supp. 6 (W.D.Ark. 1955) and *Scarborough* v. *Berkshire Fine Spinning Associates*, 128 F.Supp. 948 (S.D.N.Y. 1955), *aff'd per curiam*, 243 F.2d 575 (CA 2, 1957).

The *Peterman* decision held that an assignee has first right to "moneys due or to become due" under the government contract until the debt secured by the assignment has been fully paid. The *Peterman* decision and the decisions below are squarely inapposite.

The *Scarborough* case *supra*, involved a suit by the trustee in bankruptcy, on behalf of the creditors, for the return of moneys paid to an assignee under a valid assignment, and then paid to a third party. The rights of the third party were the rights of the assignee, which, the court held, were paramount to those of the creditors. In both *Peterman* and *Scarborough*, as in the proceedings below, there was no question but that the assignments were valid under both federal and state law. The opinions diverge, however, on the question of which law, state or federal, governs the rights of the parties under such valid assignments. *Peterman* clearly held that federal law governed the rights of the parties. The decision below holds that state law must prevail. *Scarborough* makes no specific choice between federal and state law since the same result would have ensued. The question should be resolved.

The appellate court below reinforced its conclusion that the trial court was correct in its application of the state common law to the present controversy by referring to the "provisions contained in the contract itself for the payment of claims upon termination." (see App. D) The court was apparently relying on a modification agreement executed by the government and the prime *after* the contracts were terminated. This modification, it is claimed by the respondent, binds the contractor to make payment to its subcontractors within ten days of the settlement without regard to "moneys" due under the assignment.[18] Consequently the courts below decided that the government can control the disposition of assigned funds "due or to become due" under a contract, by modifying the contract *after* the filing of a valid assignment pursuant to the Assignment of Claims Act. That conclusion is contrary to this court's decision and the principles enunciated in *Central Bank* v. *United States, supra,* and the decisions in *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Co.*, 149 F.2d 73 (CA5, 1945); *Bank of Arizona* v. *National Surety Corp.*, 237 F.2d 90 (CA9, 1956); and *American Fidelity Co.* v. *National City Bank of Evansville*, 266 F.2d 910 (CADC, 1959), all of which held that the government,

[18] As noted above, the contract termination dispute has not yet been finally settled; an appeal from the contracting officer's determination is now "pending" before the ASBCA and the Court of Claims. See *United States* v. *Bianchi*, 373 U.S. 709 (1963). Though the settlement was not accepted by the contractor as final payment, and though the matter is now before the ASBCA, the courts below saw fit to decide which of the contractor's creditors were entitled to immediate payment from the funds received. This "premature" state court determination, whether or not correct, underlines the problems and disparities that concerned this Court in *United States* v. *County of Allegheny supra.*

the contractor and the assignee were bound by the terms of the assignment as well as the express terms of the Assignment of Claims Act, which secures the assignee to the extent of monies advanced.[19]

CONCLUSION

For all the foregoing reasons, the issues herein presented do involve serious, substantial and important questions of Federal law which should be decided by this Court.

Respectfully submitted,

I. H. WACHTEL
Attorney for Petitioners
1100 - 17th Street, N. W.
Washington, D. C.

HARRY M. WASSERMAN,
JEAN J. PROVOST, JR.,
Of Counsel

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[19] The government's ability to *control* the disposition of termination settlement moneys regardless of the existence of a valid assignment is particularly startling when viewed against the 1951 amendments to the Assignment of Claims Act which bar the government from offsetting from moneys assigned, liabilities of the contractor to the government. (see App. A and footnote 11 *supra*).

APPENDIX A

31 U. S. C.

§ 203. Assignments of claims; set-off against assignee. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided*,

1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without

the consent of the head of the department or agency concerned;

2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Com-

mission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or non-withholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section, shall be deemed to affect or impair rights or obligations heretofore accrued. R. S. § 3477; May 27, 1908, c. 206, 35 Stat. 411; Oct. 9, 1940, c. 779, § 1, 54 Stat. 1029; May 15, 1951, c. 75, 65 Stat. 41.

41 U.S.C.

§ 15. Transfers of contracts; assignments of claims; set-off against assignee

No contract or order, of any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided*, 1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; 2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the dis-

bursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereinafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or

any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section, shall be deemed to affect or impair rights or obligations heretofore accrued. R. S. § 3737; Oct. 9, 1940, c. 779, § 1, 54 Stat. 1029; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; May 15, 1951, c. 75, 65 Stat. 41.

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A 180891

TANENBAUM TEXTILE CO., INC., *Plaintiff*,

v.

WELFARE FINANCE CORPORATION, an Ohio Corporation,

and

NATIONAL FACTORS, INC., an Ohio Corporation, *Defendants*

Memorandum Opinion

GUSWEILER, J.

This matter comes before the Court on a petition which originally included three causes of action. The first and third cause of action having been amicably settled and disposed of by the parties, the only issue present for consideration by this Court, is the second cause of action.

This question involves an arrangement whereby a prime contractor, The Douglas Corporation, who subsequently was dismissed as a party defendant, had entered into contractual relationship with the United States Government for supplying certain materials to the government for the war effort. The prime contractor later assigned these contracts to the Defendant, National Fac-

tors, Inc. The other Defendant, Welfare Finance Corporation became a purchaser of the Douglas account.

Later these original contracts were sub-contracted to the Plaintiff and after partial performance, the government for its own convenience cancelled and terminated the contracts. Subsequently, payments were made by the government to the assignee and the question arises whether the assignee properly credited these sums to outstanding obligations owing to the assignee from the original contractor, or whether those sums should have been paid to the sub-contractor Plaintiff, in the present cause of action.

The Defendant's contention is primarily based on the terms of the "Assignment of Claims Act" wherein the assignee is alleged to have authority to apply funds to his outstanding account with the assignor.

This Court has reviewed all the authorities submitted by Counsel in their memorandums on this question and is of the opinion that under the factual situation as presented in this case the Assignment of Claims Act has no application.

The Defendant, National Factors, Inc., was an assignee and its position can be no different than its assignor, Douglas. Under the terms of the contract and the regulations imposed by the United States Government, Douglas, the original and prime contractor was specifically bound to pay to the sub-contractor, Plaintiff, money which was advanced to Douglas for the adjudication of expenses incurred by the sub-contractor up to the time of termination by the government. (This also includes incidental expenses incurred by the termination of the contract.)

Since the Defendants are assignees of Douglas they stand in the shoes of the original contractor and are

bound by and subject to the original contractual relationship which existed between Douglas and the Plaintiff.

The briefs of Counsel have further pointed out certain relationship between the parties which included a so-called guarantee which was executed by these Defendants. This Court does not feel that the question of guarantee is one which should be properly commented upon since that issue has been disposed of heretofore by entry of the parties.

It is therefore, the judgment of this Court that the Defendants are holding the sums heretofore paid by the United States Government for the use and benefit of the Plaintiff and are at the present time liable to the Plaintiff in the amount sought together with interest from the date when this money should have been paid to Plaintiff.

Judgment is therefore rendered for the Plaintiff.

APPEARANCES:

MR. GEORGE W. WEBER, JR.,
SCHMIDT, EFFRON, JOSSELSON & WEBER,
Attorney for the Plaintiff

MR. HARRY M. WASSERMAN,
Attorney for the Defendants.

October 14, 1963.

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-180891

TANENBAUM TEXTILE CO., INC., *Plaintiff*,

v.

WELFARE FINANCE CORPORATION, an Ohio Corporation,

and

NATIONAL FACTORS, INC., an Ohio Corporation, *Defendants*

Separate Findings of Fact and Law

The separate conclusions of law hereafter set forth outlining the reasons and bases of the Court's opinion, will make it immediately apparent that the numerous Interrogatories filed by Defendant are either unnecessary or irrelevant and not of probative force. However, to avoid any possibility of error, answers to this series of questions are appended hereto.

FINDINGS OF FACTS

A brief summary of the stipulated facts is as follows:

1. The Douglas Corporation entered into contracts with the United States Government, and thereafter assigned to the Defendants, National Factors, all money due or to become due to the Douglas Corporation thereunder. In accordance with the Assignment of Claims Act, written notice of these assignments were filed by Defendant, National Factors, with the Philadelphia Quarter Master Depot. Douglas contracted with Plaintiff to furnish the cloth. (Plaintiff, in turn, contracted with Standard Products, Inc., and Electro Plastics, Inc., to coat the cloth but this is not of any importance in that these companies had no contrac-

tual relations with Douglas so that Plaintiff is the immediate subcontractor of Douglas and the other two companies were subcontractors of Plaintiff). Later, the Government terminated the contracts for the convenience of the Government. Procedures were thereupon followed as provided for and prescribed in the Armed Service Regulations (ASPR).

2. The Defendants claim that Defendant, National Factors, had advanced money to the Douglas Corporation to finance these contracts for which the latter is indebted to it in excess of the amount received by Defendant, National Factors. A finding on this question is unnecessary in view of the fact that the Court's decision is not dependent thereon.

3. The claim of Defendants is that, as assignee, they have superior rights by reason of the "Assignment of Claims Act." The only facts that need be considered, therefore, are those directly related to this issue.

4. The original contracts between the United States and the Douglas Corporation, the subject of the assignment, expressly provides that upon termination by the Government and upon determination of any immediate subcontractor's claim (Plaintiff being such immediate subcontractor), the Douglas Corporation (assignor) "*shall pay*" such immediate subcontractor the amount of its claim; that Douglas' "*obligation to make payment*" to each of its immediate subcontractors (including plaintiff) was subject only to any deduction for claims of Douglas "in connection with the contract." There are no such claims by Douglas so that the exception is inapplicable.

5. Armed Service Procurement Regulation (ASPR) issued under authority of 5 U.S.C., Sec. 22 and 10 U.S.C. Sects. 2202, 2301, 2314, in effect at all times involved in this litigation, including the times when the prime contracts

were executed and when they were assigned to Defendant, prescribe the provisions to be incorporated in the Government contracts as well as in all termination notices, papers and agreements. ASPR provides in substance that, upon termination by the Government, the prime contractor is responsible for the prompt settlement of the termination claims of immediate subcontractors. All settlement proposals and settlement agreements executed in this case were in the form and contained provisions as prescribed by ASPR.

6. In the notice of termination (as prescribed by ASPR) Douglas was requested to settle the subcontractors claims as promptly as possible.

7. In all the various settlement proposals filed with the Government by Douglas on its behalf and on behalf of its subcontractors, Douglas expressly promised to pay or credit each immediate subcontractor (Plaintiff) promptly upon receipt by Douglas of the amount covering any settlement with such immediate subcontractor (as provided in ASPR).

8. Under Modifications 4 and 6 (Exhibits 13A and 14A) the United States and Douglas ageed on a settlement of Plaintiff's claim for $82,524.72. The modifications recited (in accordance with ASPR) that this settlement was "for" Plaintiff. Under ASPR payments by the United States are not made directly to subcontractors but rather to the prime contractor (or, as in this case, to its assignee) subject to the agreement contained in the Modifications that each immediate subcontractor (in this case, Plaintiff) would be paid the amount to which it was entitled (in this case, Plaintiff was entitled to $82,524.72) within ten days after the prime contractor received the money. The only exception pertained to the contractor's privilege to deduct whatever might then be due and payable to him from a subcontractor. In this case, no claim is made of any such

indebtedness of Plaintiff to Douglas so that the exception is inapplicable.

9. On April 13, 1961, Defendants purchased the account of Douglas arising from these contracts in full satisfaction of any claims which Defendants might have had against Douglas.

10. The Defendants have held the $82,524.72 which was received on July 18, 1960 under Modification Nos. 4 and 6, and have refused to pay Plaintiff so that Plaintiff has received no part of said sum.

CONCLUSION OF LAW

1. The Defendant, National Factors, was an assignee of the contract and complied with the Assignment of Claims Act. The other Defendant, Welfare Finance Corporation, became a purchaser of the Douglas account.

2. The Defendant's contention is primarily based on the terms of the "Assignment of Claims Act" wherein the assignee is alleged to have authority to apply funds to his outstanding account with the assignor. The Court finds that the Assignment of Claims Act has no application to the question of the rights as between Plaintiff and Defendant in this action.

3. The Defendant, National Factors, Inc., was an assignee and its position can be no different from its assignor, Douglas. This fundamental rule of law is unaffected in this action by the Assignment of Claims Act. Under the terms of the contract and the Regulations (ASPR) imposed by the United States Government, Douglas, the prime contractor, was specifically bound to pay to the subcontractor, Plaintiff, any money which was advanced by the Government to Douglas for the express purpose of paying the claims of Plaintiff (Douglas' immediate subcontractor).

This also includes incidental expenses by the subcontractor incurred as a result of the termination of the contract.

4. Since the Defendants are assignees of Douglas they stand in the shoes of the original contractor, Douglas, and are bound by and subject to the same conditions and obligations imposed upon Douglas in the contracts and by the Regulations (ASPR).

5. The briefs of Counsel have further pointed out certain relationship between the parties which included a so-called guarantee which was executed by these Defendants. This Court does not feel that the question of guarantee is one which should be properly commented upon since that issue has been disposed of heretofore by entry of the parties.

It is, therefore, the judgment of the Court that the Defendants are holding the sums heretofore paid by the United States Government for the use and benefit of the Plaintiff and are at the present time liable to the Plaintiff in the amount sought together with interest from July 18, 1960, the date when this money should have been paid to Plaintiff.

Judgment, therefore, is rendered for the Plaintiff.

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

Hamilton County, No. 9470

TANENBAUM TEXTILE CO., INC., *Plaintiff-Appellee,*

v.

WELFARE FINANCE CORPORATION,

and

NATIONAL FACTORS, INC., *Defendants-Appellants.*

APPEAL ON QUESTIONS OF LAW FROM COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Opinion

(April 27, 1964)

Messrs. Whyman and Neitlich, 104 E. 40th Street, New York 16, N. Y. and Schmidt, Effron, Josselson & Weber, 809 Atlas Bank Building, Cincinnati 2, Ohio, for Plaintiff-Appellee.

Mr. Harry M. Wasserman, 906 Main Street, Cincinnati 2, Ohio, for Defendants-Appellants.

HOVER, P. J.

This is an appeal on questions of law from a decision of the court below awarding a money judgment to the plaintiff, appellee here, and against the appellants. The matter was heard on the transcript of the docket and

journal entries of the court below, a bill of exceptions, unusually extensive and detailed briefs of both parties, and the arguments of counsel.

Upon consideration whereof, the Court finds itself in complete agreement with the judgment of the court below. While the memorandum opinion filed in that court oversimplifies the numerous questions raised by this case, the extensive and detailed findings of fact and conclusions of law rendered in that court cover every material and pertinent phase of the factual and legal questions involved. This finding makes it abundantly clear that the court below based its judgment both upon the applicability of the Ohio common law rule relative to assignments generally to the effect that the rights of the assignee are controlled by those of the assignor and, further, upon the applicable Federal statute, the so-called Assignment of Claims Act and upon the specific provisions contained in the contract itself for the payment of claims upon termination. The judgment below is right on both counts.

Appellant calls the Court's attention to the case of *Peterman Lumber Company* v. *First National Bank of Fort Smith*, decided by the United States District Court for Arkansas, 128 Fed. Sup. 6. Appellant claims that this case is the same as the instant case as to its controlling factors and that the case holds, as it does, that the bank, as assignee, is entitled to priority over the claim of a subcontractor on what is a contract either identical to that in the instant case or very close to it.

Appellant overlooks that portion of the court's opinion in the case relied upon which draws a decided distinction between the controlling circumstances before it, and the controlling circumstances in the instant case. On page 13, the court states:

> "Thus the vital issue in this case is whether the assignment was to secure all the debts incurred by Adams

to the Bank in the financing of the Government contracts, or was solely to secure the advances made by the Bank to Adams on the particular contract herein involved.

"If the assignment was merely to secure the money advanced by the Bank to Adams in connection with this particular contract, then the Bank's right would not extend to money claimed by plaintiff herein, since all funds advanced by the Bank on this contract were repaid to the Bank and the money claimed by plaintiff was used by the Bank to pay an indebtedness incurred by Adams to it on a previous contract or contracts, the proceeds of which had also been assigned to the Bank.

"But, if the assignment was made to secure the money advanced by the Bank to Adams in connection with his whole operation of performing Government contracts, then the Bank's right would extend to the money claimed by plaintiff, since said money was used to pay an indebtedness owed by Adams to the Bank in connection with such contract or contracts."

In the case at bar, the contract was terminated according to its provisions by the contracting party. There is no doubt that in the words of the above quoted provision, "the assignment was merely to secure the money advanced by the Bank to (the contractor) in connection with this particular contract, . . . the Bank's right would not extend to money claimed by the plaintiff herein."

Such was the factual situation in the case at bar, and the case principally relied upon by appellant thus not only does not support his position but recognizes that the conclusion reached by the court under the facts of this case is correct.

The judgment is accordingly affirmed.

HILDEBRANT and LONG, J. J., concur.

APPENDIX E

Journal Entries

TANENBAUM TEXTILE CO. v. WELFARE FINANCE CORP. ET AL., Case No. 38902

JOURNAL 46, PAGE 576
MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

JOURNAL 46, PAGE 576
MOTION BY APPELLEE TO DISMISS APPEAL AS OF RIGHT.

It is ordered by the Court that this motion is sustained.

JOURNAL 46, PAGE 579
APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

APPENDIX F

IN THE SUPREME COURT OF OHIO

No. 38902

TANENBAUM TEXTILE CO., INC., *Plaintiff-Appellee,*

v.

WELFARE FINANCE CORPORATION, an Ohio Corporation,

and

NATIONAL FACTORS, INC., an Ohio Corporation,
Defendants-Appellants.

Entry of a Certification

On motion of Defendants-Appellants, Welfare Finance Corporation and National Factors, Inc., this Court, in addition to the Orders made herein, orders it to be certified and made a part of the Record in this case that in the appeal from the Court of Appeals, First Appellate District, Hamilton County, Ohio, in the Assignment of Errors and Brief filed in this Court, and in the argument by counsel for Defendants-Appellants in this Court, it was relied upon by said Defendants-Appellants that the rights of the parties were governed by the Federal Assignment of Claims Act of 1940, as amended, (31 USCA 203; 41 USCA 15); that the applicability of said Assignment of Claims Act had been presented to the Trial Court and Court of Appeals, both of which Courts ruled adversely to Defendants-Appellants; that a Federal question exists as to whether or not the rights of the parties herein are governed by the Assignment of Claims Act, and the applicability thereof, and that this Court dismissed said appeal for the reason that no substantial constitutional question was involved, and that this Court overruled Defendants-Appellants Motion for an Order Directing the Court of Appeals for Hamilton County, Ohio, to certify its Record.

It is hereby further certified that this Court is the highest Court of law and equity in the State of Ohio in which a decision of this case could be had.

/s/ KINGSLEY TAFT
Chief Justice

1965 TERM

To wit: Monday, March 1, 1965

No. 38902

THE STATE OF OHIO,
City of Columbus.

TANENBAUM TEXTILE CO., INC., *Plaintiff-Appellee,*

v.

WELFARE FINANCE CORPORATION, *et al.,*
Defendants-Appellants.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. 47 *Page* .... *IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this* 1st *day of* March 1965.

THOMAS L. STARTZMAN *Clerk.*
By NORMAN MYERS *Deputy.*
/s/ Norman Myers

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No. 964

In the

Supreme Court of the United States

October Term, 1964

WELFARE FINANCE CORPORATION
and
NATIONAL FACTORS, INC.,
Petitioners,

vs.

TANENBAUM TEXTILE CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MILTON H. SCHMIDT
Counsel for Respondent
700 Atlas Bank Building
Cincinnati, Ohio 45202

GEORGE W. WEBER, JR.
MARTIN N. WHYMAN
of Counsel

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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In the

Supreme Court of the United States

October Term, 1964

No. 964

WELFARE FINANCE CORPORATION

and

NATIONAL FACTORS, INC.,

Petitioners,

vs.

TANENBAUM TEXTILE CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

QUESTIONS PRESENTED

Petitioners' statement of the questions presented is misleading. They attempt to create the impression that the problem involves the failure of the Ohio Courts to follow federal law, particularly the provisions of the Assignment of Claims Act. There is no conflict between federal law and state law involved in this case. The Ohio Courts fully recognized that the validity of the assignments was depend-

ent exclusively on the Assignment of Claims Act and that the act controlled to the extent it purports to do so. The decisions below merely held that the Assignment of Claims Act, as amended, was not determinative of the priorities, equities and rights between these two parties under the facts of the case.

Therefore, a more accurate statement of the question presented is whether the Ohio Court's interpretation of the operative effect of the Assignment of Claims Act, under the specific facts of this case, is in conflict with federal law.

CONSTITUTIONAL PROVISIONS INVOLVED

No constitutional question is involved.

STATEMENT OF THE CASE

To present a true picture, a more complete presentation of the facts should be given. Some facts, for the most part completely ignored by petitioners, may be concisely summarized as follows:

(a) Petitioners' entire claim is based upon advances of one and a quarter million dollars allegedly made to another subcontractor *after* the government contracts were terminated and all work thereon ordered stopped.

(b) Petitioners had given respondent a written guarantee to pay the indebtedness of the prime contractor to respondent.

(c) There is nothing due or owing from the prime contractor to petitioners, the latter having fully released and discharged the prime contractor.

(d) The petitioners, after the assignments referred to in the petition and after commencement of this litigation, purchased all of the prime contractor's claims against the government so that it cannot claim under its original assignments as a lender.

(e) Throughout the whole proceedings (from the receipt by petitioners of the money in 1960 until the filing of an amended answer in 1963, almost two years after institution of the action) petitioners represented to respondents and to the Army that they were mere stakeholders of the money, retaining the funds only until an alleged claim (which was subsequently conceded to be non-existent) by the prime contractor against respondent was resolved.

(f) Petitioners received the money by virtue of contracts, agreements and procedures prescribed by the Armed Service Procurement Regulations, which money, in accordance with such contracts, agreements and regulations, was expressly earmarked for and directed to be paid over to the respondent.

A more detailed statement of the facts, set forth as succinctly as is possible to enable a proper consideration of the case, is as follows:

The contracts herein involved, all agreements, the termination proceedings, and all matters pertaining thereto are governed and controlled by the Armed Services Procurement Regulations (usually abbreviated and hereinafter called ASPR), 32 C.F.R. Parts 1-39 issued under authority of 5 U.S.C. § 22 and U.S.C. § 2301.2314. The provisions of the regulations relevant to the problems under discussion are set forth in the Appendix.

The four contracts entered into in 1955 between the United States and the prime contractor, the Douglas Corporation, contained specific provisions with respect to termination, as prescribed by ASPR. In Item 39 j it is expressly provided that the Government "may" make a partial payment (which is involved here) "under such terms and conditions" as the Government may prescribe. In Item 40, it is provided that if the contract should be terminated the prime contractor "shall pay" to subcontractors (respondent was a subcontractor of Douglas) the amount due them.

It is also provided that the "obligation to make payment" to the respondent is subject only to the right of the prime contractor to deduct any amount which might then be due to him from the subcontractor. With petitioners' repudiation in 1963 of their prior claims and their abandonment of their original defense that Douglas claimed a "set-off" against respondent, the "obligation" of the prime contractor to pay respondent under the provisions of Item 40 would be absolute and subject to no exceptions.

It was admitted by respondent, throughout the proceedings, (in fact, stipulated) that the prime contractor assigned the proceeds to petitioner, National Factors, and that National Factors had complied with the provisions of the Assignment of Claims Act, as amended.

The prime contractor, the Douglas Corporation, subcontracted with a company, U. S. Display, to make the ponchos, and with respondent to furnish the cloth. At the same time, the petitioners, jointly and severally, by written agreement, guaranteed the payment by The Douglas Corporation of the latter's "indebtedness" to respondent for "merchandise sold or advanced" under this sub-contract.

Merchandise was supplied by respondent but in March, 1957, the government terminated the contract for its convenience. Up to this point, petitioner, National Factors, had advanced $281,588.00. All of this money was paid by petitioner to U. S. Display but charged to Douglas by virtue of a letter from Douglas authorizing advances to U. S. Display until "the contracts were completed."

Upon the termination of the contracts, the government made written request upon the prime contractor to settle all claims of subcontractors as promptly as possible. (§ 8.-801-2 Appendix 4a) Thereafter, the Douglas Corporation (in accordance with ASPR, §§ 8.207; 8-208-3, Appendix 1a, 2a) submitted to the government the respondent's settlement

proposals. Each of such proposals contained the Douglas Corporation's express promise and agreement that:

> "Upon receipt by the contractor of amounts covering settlements with its immediate subcontractors, the contractor will pay or credit them promptly with the amounts so received."

To enable the prime contractor and the government to negotiate a settlement of respondent's claims, respondent was requested to surrender all its inventory to the United States. However, before doing so, respondent was given written assurance by petitioners that any money petitioners might receive as assignee of Douglas would be paid over to respondent. In their letter assuring respondent that it would be paid, petitioners not only cited the provisions of the proposed settlement contract with the government (called Modification) which required payment to the subcontractor within ten days of the receipt of the money by petitioners, but also referred to petitioners' "commitments" (i.e. their written guaranty) to pay to respondent any indebtedness of Douglas to it. With such assurance, respondent surrendered its inventory to the government.

First a partial settlement(in the sum of $180,420.62) of respondent's inventory claim was agreed upon by Douglas and the United States (Modification #4). Of this, the government retained ten percent ($18,042.06) and the remainder ($162,378.56) was paid to petitioners, who thereupon paid respondent. It might be mentioned here that under ASPR, payments by the government are rarely made directly to a subcontractor but, as stated in these regulations, are made to the subcontractor "*through*" or "*effected through*" the prime contractor (or its assignee) (§§ 8.208-1, 8.208-7, 8.212-1, Appendix 1a, 2a, 3a).

Thereafter, the government and Douglas agreed upon an amount to be paid in settlement of all the remainder of

respondent's claim (including the claims of its subcontractors who were to be paid by respondent). The government and the Douglas Corporation entered into a final written settlement agreement of all respondent's (and its subcontractors') claims (Modification #6). This settlement agreement is headed:

"FINAL SUPPLEMENTAL AGREEMENT OF SETTLEMENT
for
SUBCONTRACTORS NAMED HEREIN"

The Government and Douglas agreed that respondent (a subcontractor named therein) was entitled to a total amount of $244,953.28 from which was to be deducted the $162,378.56 previously paid, leaving a balance of $82,524.22. Broken down in round figures, the $82,524.72 figure represented: (a) $20,000.00 still due respondent for inventory which it had surrendered to the United States Government; (b) $36,713.97 for claims (inventory, costs, expenses and allowances) of respondent's subcontractors, Standard Coated Products and Electro-Plastics, which respondent would be obligated to pay to these companies upon receipt of the money: (c) $8,000.00 for respondent's administrative expenses; (d) $12,000.00 for attorney and accountant fees and expenses incurred by respondent in processing the claim through the government (e) $6,000.00 profit.

The government, following customarily prescribed procedure, made the payment to the respondent "through" the prime contractor's assignee. But, prior to the payment and as a condition thereto, the prime contractor was required to and did unequivocally agree (Article 5 of Modification #6):

> "the *contractor shall, within ten* (10) *days* after the receipt of the payment provided for hereunder, *pay to each* of its *immediate subcontractors* . . . the re-

> spective amounts to which they are entitled by this settlement agreement." (emphasis supplied)

There was only one exception — Douglas was authorized to deduct any amount due it from respondent.

Petitioner, National Factors, did not turn over this $82,524.72 received in 1960, to the respondent. The sole reason assigned by petitioners for not paying respondent immediately was that the Douglas Corporation claimed some "set-off" against the respondent. When the Army subsequently wrote to inquire why the "just demands" of respondent to this money were not being met, the Army was informed that payment to respondent was being held up pursuant to this Article 5 of Modification #6 because of a "set-off" by Douglas.

Prior to the institution of suit by respondent in 1961, the attorneys for respondent were expressly told by petitioners that they were mere "stakeholders" but could not pay respondent until the claim made by Douglas against respondent was resolved.

After suit was filed in 1961, the petitioners by their sworn statements in their answer admitted that

> "a final supplemental agreement of settlement was entered into by the United States Government, Douglas and National Factors"

and further swore to the fact that the payment was not made to respondent

> "by reason of said claim of Douglas Corporation they may be compelled to make a double payment."

As heretofore stated, only $281,588.70 had been advanced by petitioners up to the time of the termination of the contract. Since the termination, petitioners have retained from money received from the government a total of $550,-

500.10 or $268,914.40 in excess of the amount of advances up to the time when the contracts were terminated.

After the contracts were terminated, petitioners continued to advance large sums of money to U. S. Display which were still charged to the Douglas Corporation. These advances, *after* the contract was terminated, amounted to $1,225,828.17.

In April, 1961, petitioners, by written agreement, purchased all Douglas' accounts against the United States. Douglas surrendered all its financial interest in all its claims against the government to petitioners, and petitioners, in consideration thereof, agreed to pay Douglas $50,000.00 (plus some additional compensation contingent upon petitioners' collecting from the government). Petitioners also fully released the Douglas Corporation of all claims which petitioners might have against Douglas.

No reference was made to this agreement in the answer filed by petitioners. In fact, upon petitioners' representations that the Douglas Corporation and U. S. Display were necessary parties, these two corporations were joined in the action. Later, in November, 1961, petitioners changed their minds as to U. S. Display and it was dismissed at their request. Finally, in January, 1963, petitioners requested the dismissal of the Douglas Corporation.

At all times, from July 18, 1960, when petitioner, National Factors, had received the money, until January 22, 1963, petitioners had acknowledged their obligation to pay respondent as soon as the alleged claim of Douglas Corporation was resolved. Then, after two and one-half years had elapsed after receipt of the money, petitioners came forth with an entirely new and different basis upon which to withhold payment to respondent. They filed an amended answer in which they repudiated all their prior claims -- completely abandoning any claim of a possible set-off by Douglas – and, for the first time, claimed that the

Assignment of Claims Act gave them priority over respondent.[1]

REASONS FOR DENIAL OF WRIT

1. At the outset, respondent reiterates that the Ohio Courts fully recognized the supremacy of the Federal law and, in no sense, ignored the Assignment of Claims Act. The Courts did not apply any common law principles which were in conflict with the Act. In fact, the Ohio holding is based primarily on the application of the Armed Services Procurement Regulations (Federal Regulations) to which the Ohio Courts also gave full effect. Therefore, the doctrine enunciated in cases cited by petitioners on pages 10 and 11 of their brief has no relevancy because the issue involved in those cases is not before this Court.

2. Respondent also calls to the Court's attention that, throughout the entire proceedings, respondent raised and fully argued various reasons why, under the facts peculiar to this case, the equities were all in favor of respondent. These should be considered and the case viewed in the light of all the facts in determining whether there are any special or important reasons to review this particular case. These facts will be more fully developed later in this brief.

3. Petitioners' argument has only one theme — that the

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[1] Matters set forth in petitioners brief relative to the Appeal of Douglas are entirely extraneous to the issues herein involved. It is, however, interesting to note that the total contract price for all the ponchos to be supplied under the four contracts was $2,106,034.43 (See Modification 6). Yet, petitioners advanced $1,507,413.87 of which, as heretofore stated, $1,225,828.17 was advanced after the contracts were terminated. Petitioners have already received $712,878.66 from the government and now, according to petitioners' brief, they (as assignees who have purchased Douglas' claims) are requesting another $2,300,000.00 from the government. In other words, they are seeking to have the government pay $3,000,000 whereas it would have paid only $2,000,000 if it had received the 462,478 ponchos provided for in the contract.

decision of the Ohio Court would be disastrous to lending institutions.

This argument completely ignores all of the following:

(a) In 1945, this Court decided that the Assignment of Claims Act was not designed to regulate the equities of claimants as between themselves. *McKenzie, Trustee in Bankruptcy* v. *Irving Trust Co.,* 323 U.S. 365 (1945).

(b) The Court of Claims, consistently and for several decades, has held that the Amendments to the Assignment of Claims Act were intended to do nothing more than remove the prohibition against assignments, and that an assignee under the Act acquires no greater rights than its assignor had. *Royal Indemnity* v. *United States,* 93 F. Supp. 891 (U.S. Court of Claims 1950); *National Surety Corp.* v. *United States, et al,* 133 F. Supp. 381 (U.S. Court of Claims, 1955).

(c) This Court has heretofore denied a writ of certiorari in a Court of Claims case wherein the same arguments were advanced as here. *National Surety Corp.* v. *United States, et al,* 133 F. Supp. 381 (1955), *certiorari denied,* 350 U.S. 902 (1955).

(d) Petitioners accepted this assignment subject to the provisions of ASPR and the terms and conditions of the original contracts.

It borders on the ridiculous for petitioners to urge this Court to review this case because of the alleged plight of the financial institutions. If the decision in this case would have such profound effect upon the financing of government contracts, why have the decisions of the Court of Claims, consistently (ever since 1944), denying priority to the assignee, not already brought about such confusion as claimed by petitioners? We are unaware of any calamitous results or of any cries of distress by either the government or lending institutions because of these decisions. Why would this Court, having heretofore been presented with

such an allegedly vital question, deny certiorari? Why have not the Armed Forces changed the Regulations? Why has not Congress been importuned to amend the Act to set aside the rulings of the Court of Claims and specifically to give the lending institutions priority over every one?

The fallacy of the argument is even more apparent when one considers that in this instance: (a) the money was advanced *after* the termination of the contract so that none of it was paid out to finance the performance of a government contract; (b) the petitioners no longer occupy the status of a lender or financer of a contract but have bought for themselves all of the contractor's claims; they voluntarily, and for their own purposes, released the debtor; (c) during the period from 1960 to 1963 petitioners by their own admissions, have conclusively evidenced their belief and understanding that they occupied a position inferior to respondent — their own conduct and admissions clearly indicate that they never advanced this money with any belief or thought that they would have priority over respondent; (d) the petitioners had, in fact, induced respondent to supply the materials on their guarantee of payment.

Petitioners' argument totally ignores the fact that the supplier of materials has a vital and indispensible role in the performance of government contracts. Cash means nothing if the materials are not available.

In every phase of the law, the laborer, materialman, and the artisan have been afforded special protection by various liens and other protective measures. They have been preferred over all other creditors. The concept of priority for the lender of money over the supplier of materials, advocated by petitioners, would constitute a revolutionary change in legislative and legal thinking.

The arguments made by petitioners should be addressed to the Armed Forces to amend its regulations, or to Congress to amend the Act — not to this Court to read into the

Act a purpose or effect not expressed therein. It should not ask this Court to set aside the provisions of ASPR and to ignore both the Regulations and the provisions of the contracts.

Because it is impossible to visualize any dire consequences arising out of the lower court's decision (particularly in view of all the facts and circumstances herein involved), there seems to be no special or important reasons for review by this Court. This being petitioners' sole basis upon which they seek review, their petition should be denied.

4. The State Courts, recognizing that the Assignment of Claims Act alone controlled as to the "validity" of these assignments, correctly held that the Act did not purport to regulate the equities and priorities of these parties to the fund. The Act, throughout, uses the words *"valid"* and *"validity"* — that an assignment to a financial institution in compliance with the requirements of the Act shall be *"valid"* and that its *"validity"* shall not be questioned. In every phase of the law of contracts and assignments, a clear distinction is made between "validity" and "operative effect." In legal treatises there are separate and appropriate chapter headings for each of these two separate and distinct questions. Under "Validity" are discussed "formal requisites, legality of object, capacity of parties, consideration, consent, delivery and acceptance." Under "Operative Effect" such questions as priorities and equities of the parties are covered.

e.g., 6 *C.J.S., Assignments,* Chapter III, Requisites, Modes and Validity, p. 1089; Chapter IV, Operation & Effect, p. 1136.

The word "assignment" has a definite connotation in law. With nothing whatever to indicate any contrary Congressional intention, the word should be interpreted and applied in accordance with its universally accepted meaning -- a transfer of nothing more than the assignor's interest

whereby the assignee acquires no greater right than was possessed by assigner. 6*Am. Jur.* (2d), *Assignments*, § 102, p. 282. This is what the Ohio courts did. No rule of law peculiar to Ohio was applied. Hence, petitioners' argument about subjecting an assignee's rights to 50 various state rules is without any substance or merit.[2]

This is further emphasized by the fact that the amendments to the Act give to the assignee certain specific protections but only against certain *claims of and by the United States* against the assignor, which are not herein involved. Because the Amendments carefully spell out and limit the nature, type and extent of these protections afforded the assignee, wherein his rights transcend the assignor's, it would seem apparent that only one conclusion is possible. In all cases, other than in those wherein these exceptions of claims of and by the United States are involved, the Act must be interpreted and applied in accordance with its specific language — that it regulates and controls only the "validity" of the assignment and that the word "assignment" is used in its accepted sense.

This Court declared in *McKenzie* v. *Irving Trust*, 323 U.S. 365, 369 (1945):

> "the provisions of the statute . . . are . . . not for the regulation of equities of the claimants as between themselves"

The holding of the Ohio Courts is nothing other than an application of this principle enunciated by this honorable Court, to the facts in this case.

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[2] Petitioners' footnote 12 regarding "validation" or "notice" requirements peculiar to some states clearly illustrates the fallacy of their claims. The Ohio Court, in recognizing that the Act alone determines "validity", would obviously and logically hold that such state "validation" or "notice" requirements could not affect the "validity" of an assignment made pursuant to the Act. Petitioners thus provide examples of the distinction between "validity" and "operative effect."

5. In none of the petitioners' citations are there any facts analogous to those herein presented. Not one of them involves: (a) ASPR termination proceedings; or (b) a payment made by the government specifically for and in settlement of the subcontractor's claim and for his benefit; or (c) a payment made only if certain conditions precedent were first complied with; or (d) definite agreements by the prime contractor for the subcontractor's benefit prior to such payment. To accentuate the inappropriateness of these decisions, there are additional facts in our case, all of which we raised in our arguments in the lower courts, namely (1) the alleged claim of petitioners predicated upon advances made *after* contract termination, (2) the guaranty by petitioners, (3) the release by petitioners of the assignor; (4) estoppel.

6. There is substantial legal authority holding that the assignee under the Act does not have priority even though none of these additional facts, which make this case unique, were present.

In *Hardin County Savings Bank* v. *United States*, 65 F. Supp. 1017, 1022 (U.S. Court of Claims 1946) the Court stated:

> "We have examined the history of the Act and find nothing in it which shows that . . . Congress intended anything more than that an assignee should 'stand in the shoes' of the assignor and that an assignment made in conformity with the Act should not be declared invalid because of the provisions of R. S. Sections 3477 and 3737 . . ."
>
> "It would require clear and specific language to justify the conclusion that Congress intended by the Act of 1940 to legislate to the contrary."

Again in *Royal Indemnity* v. *United States,* 93 F. Supp. 891, 895 (U.S. Court of Claims 1950) the Court said,

> "It has been the holding of this Court that an assignee under the 1940 Act acquires no greater right than its assignor (the contractor) had . . .
> ". . . the long established principle that an assignee . . . takes only the interest of the assignor was not legislated away by the 1940 Act."

To the same effect, see *Modern Industrial Bank* v. *United States,* 101 U.S. Court of Claims 808 (1944).

And, in *National Surety Corporation* v. *United States, et al,* 133 F. Supp. 381 (U.S. Court of Claims, 1955), the case in which the Supreme Court denied certiorari, 350 U.S. 902, (1955) the Court said (p. 385):

> "We reiterate what we have said in prior cases that the 1940 amendment . . . was intended to do nothing more than to remove the prohibition against assignment of a claim against the United States in the case of a financial institution lending money to a contractor with the government.
> "Notwithstanding the passage of the amendment, the issue since its passage is the same as when [prior cases] were decided, to wit, who has the superior equity . . ."

Once again, attention might be called to *McKenzie* v. *Irving Trust,* 323 U.S. 365 (1945).

The legislative history of the act and amendments thereto fails to give any support to petitioners' claims but, to the contrary, reinforces respondents' position. Comments made in committee hearings regarding the 1940 amendment (the only one herein involved)[3] evidence a congressional pur-

[3] The 1951 amendment was designed merely to clarify the 1940 amendment with reference to claims *of* and *by the United States* because of certain rulings by the Comptroller General between 1940 and 1951. Hence, discussion of the 1951 Amendment is, in fact, irrelevant.

pose merely to permit assignments to financial institutions which previously had been prohibited. 86 *Congressional Record* 12559, 13122.

7. Under ASPR (§ 8.212-1(b), Appendix 4a) any payment prior to a final settlement of all claims is purely discretionary with the Army. As provided in any contract under ASPR, such payment will be made only "under such terms and conditions" as the government may prescribe (Item 39j).

Furthermore, under § 8.212-1(b) (Appendix 4a) the subcontractor must, as a general rule, be paid by the prime contractor before the Army will make payment. Sometimes (as here) payment will be made by the government specifically for a subcontractor's benefit in which event the payment will be made "to the subcontractor *through* the prime contractor." And, to implement this provision, the settlement agreement between the government and the prime contractor specifically requires payment to the subcontractor within ten days after receipt of the money by the prime contractor. Under governmental construction contracts, the materialman is protected by a bond (Miller Act). In ASPR no bond protection is afforded the supplier of materials. But, to provide some type of protection customarily given to laborers and suppliers of materials, ASPR contains these specific covenants to assure the subcontractor of being paid.

We believe, therefore, it is evident, from the reading of the Regulations that the contractor (or his assignee) is merely the instrument, agent or conduit through whom the payment to the subcontractor is made. Further, the contractor (or his assignee) has no right to and will not receive any money except on the express condition that it will be turned over to the subcontractor. There is no question that the money was unequivocally earmarked for respondent's benefit; that the contractor (or his assignee whose rights can not be greater than the assignor's) has no

right or privilege to keep or to use the money except to pay the subcontractor. The subcontractor is the real (third party) beneficiary of the contract.

8. The state courts were, then, correct in holding that petitioners received the money under the same conditions and subject to the very same obligations that were imposed on assignor. The assignee was not entitled to receive anything which would not be payable to the assignor; if the assignor's right to receive the money was subject to express conditions and obligations for respondent's benefit and protection, so was the assignee's.

Petitioners, at all times, knew (or were presumed to know) that their rights were subject to, limited and controlled by: (a) the provisions of ASPR, (b) the terms and conditions of the prime contracts, and (c) the covenants of the Douglas Corporation (prescribed by ASPR) in the settlement proposals and in Modification 6, which were a condition precedent to any payment by the government.

Therein lies the fallacy of petitioners' argument about subjecting the "collateral" to "after acquired equities." The "equities" of respondent have their inception in the provisions of the Regulations and in the prime contract which preceded the assignments. Petitioners' attempt to argue that the covenants in Modification 6 were "after" the assignment completely ignores the fact that such covenants were prescribed by and in strict conformity with the Regulations (§§ 8.209-1; 8.806-1; 8.806-3, Appendix 3a, 5a, 6a); that petitioners knew (or were presumed to know) at the time of the assignments, that such provisions and covenants would be incorporated in any settlement agreement if the prime contracts were terminated. Such argument disregards the fact that petitioners knew that the government was not required to make and would not make any payment without such covenants; they fully realized that payment by the government was based on and induced by the definite

promise that respondent would receive the money within ten days.[4]

Petitioners reference to the Ohio Courts' holding being a "premature" state court determination ignores the fact that the parties voluntarily entered into Modification 6 for the specific and sole purpose of settling and paying respondent's claim. Undoubtedly, petitioners were concerned and anxious to get the government to settle respondent's claims to protect them against any possible loss as a result of their guarantee to respondent.

9. Respondent advanced other arguments in the Ohio Courts. Petitioners' claim of indebtedness of Douglas to them is entirely contrary to fact. They fully released Douglas. Douglas owes them nothing. Petitioners, by their conduct and their avowals, induced respondent to surrender all its inventory. They misled the Army which, had it been apprised of any such claims as petitioners are now making, may have taken other action to protect respondent. Hence, estoppel can be invoked by respondent. Petitioners were guarantors of Douglas' indebtedness to respondent. Yet, despite such guaranty, they now seek to appropriate for themselves money they received from the government for the sole purpose of paying off Douglas' indebtedness to respondent (the very thing which they had guaranteed would be paid).

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[4] In their footnote 19, petitioners seemingly concede that under ASPR respondent is entitled to the money. They merely find "the government's ability to *control* the disposition of the money startling." Nothing in the Act or amendments thereto expressly or impliedly prohibits the government from affording this protection to subcontractors. The express provisions of the Amendments relating solely to liabilities of the contractor *to* the government certainly can not be interpreted to apply to claims of a subcontractor against the contractor.

CONCLUSION

On the facts presented, the Ohio courts correctly interpreted the effect of the Assignment of Claims Act, as amended. There is no question that the money was paid out for one purpose only — to reimburse respondent. It was clearly ear-marked for respondent's benefit. There is nothing whatever in the Assignment of Claims Act to indicate that, under such circumstances, Congress intended that an assignee should be entitled to appropriate such fund for its own use and to deprive respondent of money which, by the application of any equitable principles, is rightly its. The correctness of the decision is further emphasized by petitioners' inconsistencies, their prior conduct and admissions, their contrary-to-fact claims, and their guarantee.

Petitioners have no legal, moral or equitable claim on these funds. But aside from the correctness of the decision, there is nothing in this one case of any public or general interest to warrant further review.

We respectfully submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

MILTON H. SCHMIDT
Counsel for Respondent
700 Atlas Bank Building
Cincinnati, Ohio 45202

GEORGE W. WEBER, JR.
MARTIN N. WHYMAN
of Counsel

APPENDIX

CODE OF FEDERAL REGULATIONS
TITLE 32 – NATIONAL DEFENSE

§ 8.207 **Audit of settlement proposals and of subcontract settlements.**

* * *

(b) Subcontract settlements submitted by the prime contractor to the contracting officer for approval or ratification in accordance with § 8.208 shall be referred to the cognizant audit agency for review and recommendations if (1) the settlement involves $25,000 or more; or (2) the contracting officer considers an audit, in whole or in part, desirable. The audit agency shall submit a written report and recommendations to the contracting officer, in accordance with Departmental proced[illegible]es.

§ 8.208 **Settlement of subcontract claims.**

§ 8.208-1 **Subcontractor's rights.**

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. The rights of a subcontractor are against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the termination claims of immediate subcontractors.

§ 8.208-3 **Settlement procedure.**

• • •

(c) The contracting officer shall promptly examine such subcontract settlement required to be submitted to him (including the basis and form of the proposal upon which the settlement was based) to satisfy himself that the subcontract termination was made necessary by the termination of the prime contract, and that the settlement was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract (or if allocable only in part, that the proposed allocation is reasonable). In considering the reasonableness of any subcontract settlement, the contracting officer shall be guided generally by the provisions of this part relating to the settlement of prime contracts, and shall comply with any applicable requirements of §§ 8.207 and 8.211 relating to audit and review. Upon completion of the examination, the contracting officer shall notify the contractor in writing of (1) his approval or ratification, or (2) his reasons for disapproval.

§ 8.208-7 **Government assistance in settlement of subcontracts.**

In unusual cases the contracting officer may determine that it is in the best interests of the Government to offer assistance to the prime contractor in the settlement of a particular subcontract. Such a situation may exist when the prime contractor has made all reasonable efforts to negotiate the settlement without success and the contracting officer believes that with the assistance of the Government a settlement can be reached. Such assistance shall be furnished only with the consent of the prime contractor. In such cases, an agreement may be entered into by the Government, the prime contractor, and a subcontractor,

covering the settlement of one or more subcontracts. In any such case, payment to the subcontractor shall be effected through the prime contractor as part of the overall settlement with the latter.

§ 8.209 **Settlement agreements.**

§ 8.209-1 **General**

When a settlement has been negotiated with respect to the terminated portion of a contract, and all required reviews have been obtained, the contractor and the contracting officer shall enter into a settlement agreement, substantially in the form set forth in the appropriate subparagraph of § 8.806. The settlement shall cover (a) any setoffs and counterclaims which the Government may have against the contractor and which may be applied against the terminated contract, and (b) all claims of subcontractors, except claims which are specifically excepted from the agreement and reserved for separate settlement.

§ 8.212 **Payment.**

§ 8.212-1 **Partial payments upon termination.**

(a) **General.** If the contract authorizes partial payments on termination claims prior to settlement, a fixed-price prime contractor, or a cost-reimbursement prime contractor whose settlement proposal includes costs, may request such partial payments in the form set forth in § 8.802-10 [a facsimile of each of the forms have been filed with the Federal Register Division] at any time after submission of interim or final settlement proposals. Applications for partial payments shall be processed promptly. Partial payments to a subcontractor shall be made only through the prime contractor.

(b) **Amount of partial payment.** Before approving any partial payment requested by the contractor, the contracting officer shall have made such accounting, engineering, or other specialized reviews as he deems proper of the data required by this part to be submitted in support of the contractor's settlement proposals. If such reviews and the contracting officer's examination of the data indicate that the requested partial payment is proper, the contracting officer may, in his discretion, authorize payment as follows:

* * *

(2) An amount up to 100 percent of the amount of any subcontract settlement effected and paid by the prime contractor: **Provided,** The settlement has been approved or ratified by the contracting officer pursuant to § 8.208-3(c) or has been authorized pursuant to § 8.208-4;

* * *

(5) An amount up to 100 percent of partial payments made to subcontractors in conformance with this subparagraph. No partial payments shall be made on account of profit or fee which may be claimed with respect to the terminated portion of the contract. In exercising his discretion as to the extent to which partial payments shall be made, the contracting officer shall consider the diligence of the contractor in settling with its subcontractors and in preparing its own claim.

§ 8.801-2 **Letter notice of termination.**

* * *

2.(b) You shall give notice of termination to each of your immediate subcontractors (including suppliers) who will be affected by the termination of your contract. In such notice you shall (1) give him the number of your contract with the Government, (2) state that it has been terminated (or terminated in part, if that is the case) for the convenience of the Government, (3) give him the name

and address of the Contracting Officer, (4) instruct him to stop all work, to make no further shipments, to place no more orders, and to terminate all subcontracts under this contract with you (subject to the same exceptions stated in paragraph 2(a)), (5) direct him to submit his settlement proposal promptly in order to expedite settlement, and (6) request him to give similar notice and instructions to his immediate subcontractors.

* * *

7. **Settlements with subcontractors.** You remain liable to your subcontractors and suppliers for claims arising by reason of the termination of their subcontracts or orders. You are requested to settle such termination claims as promptly as possible. For purposes of reimbursement by the Government, such settlements will be governed by the provisions of 32 CFR Part 8.

§ 8.806 **Forms of settlement agreement.**

§ 8.806-1 **Settlement agreement for use in settling fixed-price prime contracts after complete termination.**

* * *

Art. 4. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate sub-contractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

§ 8.806-3 **Partial settlement agreement, for use in settling fixed-price prime contracts after complete or partial termination where settlement pertains only to settlements with subcontractors.**

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Art. 2. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.